Position of the European Sea Ports Organisation
On the Port Regulation proposal and the TRAN report, amendments and compromises in view of the vote in the TRAN committee on 25 January 2016

21 January 2016

Introduction

On 25 January, the Transport Committee of the European Parliament will be voting on the report of Mr Knut Fleckenstein on the Proposal for a Regulation proposal establishing a framework on market access to port services and financial transparency of ports**.**

Since the adoption of the Commission proposal(COM (2013) 296) in May 2013, ESPO members have been assessing the concrete impact of the Regulation proposal and expressing their concerns. European port authorities were very much worried about the initial Commission proposal since they feared that it could make well performing European ports engines sputtering, instead of providing ports the tools needed to face current and future challenges.

Over the last two years, ESPO and its members have put a lot of effort in establishing a constructive dialogue with the Commission, the Parliament and the Council in view of reaching an agreement on a policy that is a step forward for every single port in Europe. Since the start, both the TRAN rapporteur, Mr Knut Fleckenstein and the TRAN shadow rapporteurs have showed a lot of willingness in exchanging views with ESPO and its members.

European port authorities appreciate very much this open dialogue and recognise the efforts made by the rapporteur and other members of the Transport committee to understand European ports and port authorities. Overall, ESPO believes this understanding of European ports and their diversity is well reflected in the compromise amendments that will be submitted to the vote. It can be seen as a good basis for negotiations with the Council in view of achieving an acceptable legislative framework for ports in Europe.

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What are the "red lines" for European port authorities?

European Ports need an economic and political environment that gives them the tools to face current and future challenges[1] and that allows them to fully use their potential as enablers of economic growth.

ESPO believes that the European Union needs to be a positive force in strengthening port management and port development policy, by levelling the playing field and providing legal certainty and stability on the one hand, while fostering growth and development of ports on the other. Well-performing ports will undoubtedly contribute to the ambition of Europe to establish a competitive and resource-efficient transport system.

In that respect, ESPO members can support a legislative framework that:

- respects the **diversity** of European ports: European ports differ because of their geographical situation, governance model and organisation structure, markets they serve, tasks, size, financing model, competitive position and market power. The proposed Regulation should therefore be flexible enough to address all those differences in a proper way.

- recognizes the **autonomy** of a port authority to set its own charges and to define a minimum quality service level by setting minimum requirements and, where relevant, public service obligations, for its service providers.

- develops **a flexible framework for organising port services,** which **takes into account its specific character and features.** Such a framework should not hold back strongly performing ports.

- ensures **financial transparency** where ports receive public funding for their infrastructure and/or operations; this should however not result in disproportionate administrative burden.

[1] Challenges are: Growing traffic volumes in ports, which are more and more clustered; Ever-increasing ships size and the cost of subsequent adaptation of port and port-hinterland infrastructure; Increasing market power ports are facing as a result of alliances between shipping lines; National budget constraints limiting the possibilities of public funding for transport infrastructure; Volatility in energy prices in Europe, the new energy landscape and the transition to alternative fuels; Entry into force of the stricter sulphur limits in ECA countries; An increasing societal (housing, city development needs) and environmental pressure; Potential changes in shipping routes following key infrastructure developments (Panama, Second Suez Canal Fairway, Nicaragua Canal, Opening up of the Arctic Route…); Geo-political situation; Further globalisation of business and society; Remaining barriers to the internal market for maritime transport.

ESPO's position in further detail

(following the order of the articles of the Regulation)

In this section, ESPO is listing its main concerns regarding the Commission Port Regulation proposal and assesses the amendment and compromise proposals that will be subject to a vote on 25 January.

1. **Scope – Dredging is not a port service in the sense of this Regulation (article 1 and 11)**

Dredging is part of the maintenance of the port infrastructure. It is the responsibility of the managing body of the port and/or competent authorities to keep the port accessible. Dredging is therefore not a port service that the port authorities are offering to their customers. Port users are not paying a port service charge for the dredging in the port but are charged through the port infrastructure charges. Moreover, dredging is considered a public task in many cases, in some cases even serving other than transport needs. Dredging operations are therefore often carried out in accordance to public procurement rules and the correspondent EU legislative framework, which port authorities have to comply with.

- ⇨ **Compromise amendment 1 is excluding dredging from the scope of this Regulation. ESPO fully endorses this compromise. ESPO can also accept a reference to dredging in the Chapter on financial transparency. When dredging activities are subject to public funding this should appear in a transparent way into the accounts of the port authority. ESPO can therefore support the reference to article (12)2 in compromise 1 and is in favour of compromise 12.**

2. **Freedom to provide services and proportional market access rules and procedures (Article 3)**

It should be clear that ports and port authorities are also subject to the Treaty and that **the freedom to provide services** should apply to them as well. However, in the interest of the most efficient operation of a port, port authorities must have the possibility to limit the number of service providers. A port with limited operational space, or a limited capacity, should not be obliged to open its market for an unlimited number of service providers. Equally, a port can be obliged to restrict the number of service providers for reasons of safety, security or protection of the environment (e.g. case of pilotage). Such a limitation can, but should not automatically, be linked to a public service obligation. But ESPO agrees that any limitation preventing competition should be then accompanied by open selection procedures and safeguards in terms of port charging to prevent potential abuses.

⇨ **Compromise amendment 3 puts forward the principle of "freedom to organise ports services". It clearly explains that the organisation of port services can be subject to different tools (minimum requirements, public service requirements, internal operator or free open access). In each of these cases certain principles, as set out in the regulation, have to be respected. ESPO fully supports this approach. Ports in Europe are very diverse. The proposed Regulation should therefore be flexible enough to address all those differences in a proper way. This flexibility is given in compromise 3.**

One of the tools of European port authorities to organise their port services is the possibility to set minimum requirements to the service providers operating in their port. These minimum requirements (see article 4) can touch on different aspects (professional qualifications, environment, safety and security, availability of the service, …) and allow ports to take into account their priorities, economic strategy and specific local environment.

⇨ **Whereas the wording of compromise amendment 4 can be supported in general as a "compromise", ESPO would prefer that the right to set minimum requirements is reserved in the first place to the managing body of the port. ESPO fears that adding the "competent authority" will change the rationale of article 4, which is in essence an instrument for the managing body of the port, who wants to define certain quality requirements for its service providers. ESPO therefore asks the deletion of "competent authority" in paragraph 1 of compromise amendment 4.**

The **rules on the selection procedure** in case of limitation of the number of providers should not result in additional and unnecessary administrative bureaucracy. The requirement to use a selection procedure which is open to all interested parties, non-discriminatory and transparent is enough to ensure an open market. However, only port service contracts that are "concessions" in the sense of the concession directive 2014/23/EC, should apply the procedure and rules of the concession directive.

⇨ **This approach is very well reflected in compromise amendment 5, in particular in paragraph 3a thereof. This compromise amendment therefore has the full support of ESPO.**

EU rules should not interfere with the freedom of Member States or public authorities to decide the way they carry out their public service tasks, be it in-house or through a controlled legal entity or through a private partner selected under the public procurement rules. **Ports and port authorities must be allowed at all times to operate themselves one or different port services.** When a legally established limitation restricts competition, extra guarantees should be established to avoid abuses or conflicts of interest.

⇨ **Compromise amendment 7 is much closer to ESPO's approach than the original article 9. European port authorities fully agree that internal operators should respect the same minimum requirements set by the port for the other service providers. However, as**

regards the "confinement principle" (see paragraph 3) – this is the interdiction as an internal operator to operate this in-house service in another port – this should *only* exist *in case* the internal operator is working under a public service obligation, there is a limitation of the number of service providers for the given service and the internal operator receives a financial compensation for operating the given service. In all other cases, when operating in another port, there is no risk of distorting competition with the other service providers. An adjustment of compromise amendment 9 in that direction would be very much welcomed by ESPO.

3. Port infrastructure charging (article 14)

The Commission proposal recognizes the role of the port authority in setting its own charges. ESPO fully welcomes this principle. Managing bodies of the ports are involved in economic activities in competitive markets. Port charges are an important tool of port management. **In order to provide ports with proper autonomy to pursue their economic strategy, the possibilities to vary port infrastructure charges should not be restricted**. In addition, the possibility to negotiate individually with port users should be allowed to attract new traffics or retain existing ones during downturns.

A freedom to negotiate and differentiate port infrastructure charges should however not be seen as a "wild card" for applying dumping charges or a licence for the abuse of a port's dominant position. **State aid and competition rules should be fully applied.**

While setting the principle of the autonomy of the port authority in setting its own charges in paragraph 1 of article 14, the Commission is taking back this autonomy to some extent in paragraph 5 by empowering the Commission to decide on common classifications of vessels and fuels and subsequently on common charging principles for port infrastructure charges. Variations on the basis of environmental performance of ships should be considered as a possible tool of the port to vary its charges, not as an obligation. Classification of vessels should happen at international level.

Furthermore, the Commission in its proposal of 2013, is also interfering with the role of the port in setting its own charges, by obliging the managing body of the port authority to explain port users, on top of the structure and criteria used to determine the charges, also the costs and revenues that served as a basis. In the setting of port infrastructure charges, elements such as market evolution, investments and deployment plans, the competitive position of the port and other many relevant factors have a considerable influence. Providing information to users on total costs can lead to unnecessary disputes and even jeopardize the port's commercial strategy.

Finally, ESPO believes that the transparency provisions in Chapter III are an important instrument to monitor public funding, costs and revenues and potential abuses.

- ⇨ **The autonomy of the port authority to set and vary the port infrastructure charges, as recognised by the Commission in its proposal is one of the main assets of this Port Regulation. Maintaining this principle in the Port Regulation is a red line for ESPO.**
- ⇨ **ESPO welcomes in that respect compromise amendment 12 and 27 (recital), which recognise that setting and varying port infrastructure charges in function of the port's economic strategy is an important tool for the managing body of the port. In addition, the compromise amendments fully reflect the idea that the criteria for variation of infrastructure charges should be flexible and back the right of port authorities to negotiate the charges on an individual basis. As a counterpart, the reference to state aid and competition rules is strengthened.**
- ⇨ **ESPO also welcomes the deletion of paragraph 5 of article 14. Variations on the basis of environmental performance of vessels should be considered as a possible tool of the port to vary its charges, never as an obligation.**
- ⇨ **ESPO can also support paragraph 6 in its current wording. The managing body of the port should inform their customers in a transparent way about their overall strategy to set charges. It is however impossible to disclose the result of individual negotiations.**

4. Relationship with stakeholder and port users (article 15 and 16)

The principle that there is a dialogue with port user representatives on the charging of port infrastructure and port services is a sound one. This already happens in practice. **Port authorities have regular contacts with their customers as a normal commercial practice. Imposing EU rules is unnecessary and could lead to duplication of forums and processes.** It should be left to the managing body of the port to organise such dialogue according to its particular circumstances (e.g. the scale of a port) and needs (e.g. commercial strategy, development plans), while complying with this basic principle.

The ports environment is a business to business environment. Port customers buying power is in most of the cases such as to ensure that the charges levied are subject to downward pressure. Certainly, as a result of the concentration in the shipping industry, ports have to deal with increasingly powerful customers which do not need extra protection from the EU .

Equally, port authorities in Europe are very much aware that **a constant dialogue with stakeholders is needed to secure the "licence to operate" and the "licence to grow" for their port**. ESPO therefore fully supports this principle, but believes that European legislation should not go beyond setting the principle, by prescribing how to dialogue.

- ⇨ **For ESPO, compromise amendment 13 is a substantial improvement of the Commission proposal. ESPO however believes that the wording of the Council in its general approach of October 2014 is more clearly setting the principle without being prescriptive on modalities and procedures. ESPO hopes that article 15 and 16 can be further improved in the negotiations between the Parliament and the Council .**

5. **No need for an independent supervisory body to ensure application of the regulation (Article 17)**

For ESPO, it is clear that the rules of this regulation, when adopted, should be applied. Member States should also ensure that they have an independent complaint mechanism in place allowing any party having a legitimate interest to lodge a complaint. On top of that, port users and other relevant stakeholders should be well informed about where and how to lodge a complaint.

The requirement to designate or establish an independent supervisory body is however unnecessary. In response to complaints of abuse of dominant position or unfair pricing, national competition authorities or other existing competent authorities can already today request information from the parties involved and launch an investigation. Moreover several Member States have an arbitration procedure in view of settling disputes. Additional institutionalisation and bureaucracy should be avoided in a time when resources are under pressure in all Member States.

⇨ **Compromise amendment 14 clearly shows that the Parliament is sharing ESPO's concerns. Again ESPO supports this approach which considerably improves the Commission proposal. ESPO however believes that article 17 would gain in clarity if it was reduced to a few paragraphs which stress the importance of having a complaint procedure and of informing users how and where to lodge a complaint. ESPO has a preference for the wording of the Council in its General Approach of October 2014. Content wise both texts are very similar. The wording of the Council is however a lot more clear.**

6. **ESPO supports the request for more clarity as regards state aid to port infrastructure**

As regards **state aid to ports** ESPO is asking the Commission and EU policy makers to:

- provide a pragmatic, predictable and stable environment for port authorities allowing them to develop together with all parties involved (public authorities, private investors, etc..) a long-term strategy for port investments and thus limiting the legal uncertainty that might result from a case-by-case approach of the Commission.
- achieve a level playing field for port investments and operations between ports and transport modes in the European Union but also with third country ports which are in direct competition with EU ports.
- reduce the administrative burden and shorten the timeframes.
- take a consistent (coherent) approach in the assessment of EU funding and national/regional funding of transport infrastructure.

⇨ **Compromise amendment 25 asks the Commission to clarify the notion of State aid with regard to the financing of port infrastructures and to identify in consultation with the**

sector which public investments in port infrastructure should fall under the scope of the General Block Exemption Regulation. ESPO fully supports the text of this compromise.

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Since 1993, ESPO represents the port authorities, port associations and port administrations of the seaports of the EU. The mission of the organisation is to influence public policy in the EU to achieve a safe, efficient and environmentally sustainable European port sector operating as a key element of a transport industry where free and undistorted market conditions prevail as far as practical.

More information on ESPO: www.espo.be